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No. 85-1625

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

PEARL INVESTMENT COMPANY,
a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 15, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

18 pp

QUESTION PRESENTED

Did the District Court abuse its discretion in ordering an action stayed under the *Pullman* abstention doctrine so that the state court could determine issues of state law pertaining to the imposition of conditions on the approval of an owner's building permit application?

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STATEMENT OF THE CASE

Petitioner, engaged in the business of real property management in San Francisco, applied for a permit to convert 24 residential units to commercial use (the property currently consists of 8 commercial shops and 24 residential units).

The Charter of the City and County of San Francisco requires City Planning Commission approval prior to issu-

ance of a permit affected by the City Planning Code. Discretion to determine whether to approve planning permits is granted by that charter provision and by a municipal code provision which states as follows:

> In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

Petitioner's permit application was also subject to state and local laws requiring environmental review and to a state statutory scheme setting certain deadlines for local agencies to act on permit applications (Government Code Section 65920, *et seq.*, the Permit Streamlining Act).

Under its power of discretionary review, the City Planning Commission conducted a series of public hearings on Petitioner's permit application because of concerns raised by residents and property owners in the affected area over the dislocation of tenants in the building, the loss of affordable residential units, and the potential change in the mixed residential-commercial character of the neighborhood.

While the City Planning Commission had under consideration and took action on Petitioner's application, it also conducted hearings on and adopted amendments to the Residence Element of the City's Master Plan, calling for mitigation of hardships caused by the private demolition

of existing residential units. Such policies were adopted in light of data indicating that existing housing stock is virtually irreplaceable given the cost of new construction.

Prior to final Commission action on Petitioner's application, Petitioner filed a Petition for Writ of Mandate, Declaratory and Injunctive Relief in the San Francisco Superior Court seeking, *inter alia,* an order compelling issuance of its building permit pursuant to provisions of state and local law governing environmental review and provisions of the Permit Streamlining Act. Those allegations are repeated in the complaint Petitioner filed in Federal Court in connection with its allegations of constitutional violations.

The San Francisco Superior Court denied Petitioner's request for a writ of mandamus based on the alleged violations of these state and local laws.

Before the City Planning Commission took final action on its permit application, Petitioner indicated its willingness to modify its application to retain 13 dwelling units. The Commission approved the permit application (as modified, to retain 13 dwelling units), subject to various conditions, including those requiring Petitioner to provide financial relocation assistance to tenants and replacement of the residential units to be converted. Petitioner did not appeal that decision to the City's administrative appellate body, the Board of Permit Appeals.[1]

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[1]One issue in this action is the doctrine of the exhaustion of administrative remedies. The City's position is that the exhaustion requirement is applicable to the property owner under

(Continued on following page)

The Petitioner thereafter filed a Complaint in the United States District Court. The City sought an order directing abstention under the *Pullman* doctrine, which the District Court granted and the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court firmly established the principle that abstention is appropriate where the complaint:

> . . . touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is given. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

312 U.S. 496, 498.

The *Pullman* Court emphasized the importance of furthering harmonious relations between state and federal authority:

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law

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California law. *People v. Coit Ranch, Inc.* (1962) 204 Cal.App.2d 52. The property owner has not filed an appeal to the City's appellate administrative agency, the Board of Permit Appeals, and apparently takes the position that exhaustion is not necessary in either Federal or State Court.

> [Citation]; or the administration of a specialized scheme for liquidating embarrassed business enterprises [Citation]; or the final authority of a state court to interpret doubtful regulatory laws of the state [Citation].

312 U.S. 496, 500.

The Court in *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S. Ct. 2321 (1984), described the *Pullman* doctrine as follows:

> In *Railroad Comm'n. v. Pullman Co., supra,* this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.

— U.S. —, 104 S. Ct. 2321, 2327.

In the case now before this Court, the District Court abstained based on the authority of *Pullman*. The Court of Appeals affirmed that decision, notwithstanding its conclusion that

> [i]f this case presented an issue of first impression in this circuit, we would be inclined to agree with Pearl that the pertinent state law issues are not uncertain.

Appendix B to Petition For Writ Of Certiorari, p. B-9.

Petitioner (hereinafter "Pearl") seeks a review of the decision of the Court of Appeals on the grounds that this case involves no uncertain issues of state law other than those inherent in any action involving the processing of a local land use permit application.

The City and County of San Francisco submits that this case does indeed involve uncertain issues of state law and that the uncertainty extends beyond the fact that this

case involves municipal action on a land use permit application.

One of the focal points of Pearl's complaint relates to the exercise by the City Planning Commission of its power of discretionary review.

The power of discretionary review, as it is commonly called, refers to the authority of the City Planning Commission to review building permit applications and to disapprove any application for reasons other than a violation of code restrictions. The authority for the exercise of that power is set forth in the San Francisco Charter, the City Planning Code and Section 26 of Part III of the San Francisco Municipal Code.

The role of the City Planning Commission in reviewing building permit applications extends beyond the consideration of whether the proposed project meets code requirements. City Planning Code Section 170 provides in relevant part:

> In their interpretation and application the provisions of this code shall be held to be minimum requirements.

Thus, compliance with the Building and Planning Codes is merely a "first step" in receiving approval for a proposed project. The duty of verifying that such compliance exists is imposed on the zoning administrator by charter directive.

The Planning Commission's powers and duties in considering proposed projects are guided not only by the "minimum requirements" of the Planning Code but also

by the criteria set forth in Planning Code Section 101, which embodies the objectives and purposes of the code.

In addition to the authority found in the City Charter and City Planning Code for the exercise of discretionary review, San Francisco Municipal Code, Part III, Article I, Section 26 authorizes the City Planning Commission to exercise this power. That section provides:

> In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

Thus, in acting on building permit applications, the City Planning Commission is vested with broad discretion based on consideration of the general public health, safety and welfare.

Pearl challenges the City's exercise of discretionary review over building permit applications on procedural and substantive due process grounds. It argues that the California Supreme Court has definitively ruled on the validity of that power, citing *Lindell Co. v. Board of Permit Appeals of City and County of San Francisco* (1943) 23 Cal.2d 303, 144 P.2d 4, and *City and County of San Francisco v. Superior Court* (1959) 53 Cal.2d 236, 347 P.2d 294, and that there are no issues of state law of uncertain resolution in light of those two decisions.

These two decisions do not, however, resolve the questions at issue in this action. San Francisco's legislative

scheme, which vests broad discretion in the Commission in its review of permit applications, was formulated in an era far different from today, both in terms of the complexity of urban life and the complexity of laws adopted to address difficult social problems.

Land use issues involve some of the most complex issues of public law facing legislative bodies today. In a modern urban environment, increasingly varied demands are being made by different groups upon space which has become increasingly more scarce and more valuable. As the density of the population increases, the complexity of the demands and the conflicts between them become more acute and pressing. Accordingly, governmental officials charged with the administration of laws must execute more subtle and sensitive discretionary powers.

Even a casual familiarity with recent urban planning issues reveals the varied legislative responses to these types of demands: ordinances regulating residential rents, the conversion of condominiums, and the conversion of residential hotels; the establishment of special use districts, including districts which control the conversion of housing units; and moratoria on development or the establishment of certain uses.

No California court has considered the scope of the power of discretionary review within the context of the more complex laws, at both the state and local levels, regulating land use. The two California cases that have considered discretionary review have done so in circumstances that were factually and procedurally far different from that in issue in this action. The first, *Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*,

supra, decided in 1943 prior to the myriad of changes in the City's legislative scheme, considered disapproval by the Board of Permit Appeals of a large housing project (on what was apparently undeveloped property). The second, *City and County of San Francisco v. Superior Court, supra,* decided in 1959, authorized *approval,* not disapproval, of an application.

In the case at bar, the City placed conditions on the approval of Plaintiff's application, conditions which imposed an affirmative duty on the applicant to provide replacement housing to accommodate the housing problem which its project would create and to provide tenant relocation assistance. This is not a case of the denial of an application. The unresolved issue of state law turns on the power of an administrative agency, through its power to exercise discretion over the issuance of permits, to impose additional requirements on developers such as those involved in this action before it will approve a project. In light of the changes since 1943—both in society and in the complexity of state and local laws—it can hardly be said that the law in California is settled with respect to the power of discretionary review. Indeed, the scope of that power has yet to be delineated by the California courts. That task is one properly left to the State, first through its own administrative processes and thereafter through its own judicial system.

This action thus involves a central undecided issue of state law, thereby meeting each criterion used in determining whether *Pullman* abstention is appropriate.

In addition, resolution of the issues in this case requires a determination of the lawfulness of a variety of

actions undertaken pursuant to state and local law governing zoning permit applications: those taken pursuant to environmental review and the Permit Streamlining Act; those taken pursuant to the City's discretionary review procedure; the Commission's adoption of the Residence Element of the City's Master Plan; the City's adoption of its residential rent control scheme; and the adoption and implementation of the City's Office/Housing Production Program. Pearl's complaint is a broadside attack with respect to all of these legislative and administrative actions. See Appendix C to Petition for Writ of Certiorari, pp. C-2 - C-4.

Are these issues more properly decided by the State or Federal Courts?[2] There are certainly considerations favoring resolution by the State Courts. State Court judges handle a considerably greater volume of land use litigation and are, therefore, more familiar with land use problems in general and state and local legislation regulating the land use process in particular. Moreover, there is greater familiarity by the State Court with local conditions, including local expectations as to the appropriate balance between the property owner's right to the unrestricted use of his property against the public's right to affordable housing, tenant protections, a quality living environment, open space, and other planning considerations.

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[2]With respect to actions taken pursuant to environmental review requirements and the Permit Streamlining Act, Pearl itself acknowledged the appropriateness of State Court review by its filing of an action in State Court seeking an order compelling issuance of its building permit. Perhaps dissatisfied with the denial of that petition, Pearl repaired to Federal Court, apparently hopeful of a forum more favorably disposed to its complaints.

Federal Court intervention may stifle innovative state efforts to find solutions to complex social problems. There also exists the fear that, since virtually any violation of state law governing land use can be the basis for a due process or equal protection challenge, retention of federal jurisdiction of all land use cases will turn federal courts into a zoning board of appeals. These grounds for deferring to state adjudication have been recognized by various courts and legal commentators. *See Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F.2d 481 (4th Cir. 1974); *Kent Island Joint Venture v. Smith,* 452 F.Supp. 455, 462-3 (D. Md. 1978); *The American Bench,* 170-175, 185 M. Reincke ed. 1979; *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1094-5 (9th Cir. 1976); and *Hill v. City of El Paso, Texas,* 437 F.2d 352 (5th Cir. 1971).

The conditions imposed on Pearl arose out of the Commission's concern over the loss of affordable housing and the displacement of tenants. In California, these issues are a matter of statewide, as well as municipal, concern. It is articulated state policy that cities and counties regulate the uses of land so as to preserve housing opportunities for all economic segments of the population. *See* Health and Safety Code Section 50002, *et seq.* (State Housing Policy); Government Code Section 65580 ("(d) Local and state governments have a responsibility to . . . make adequate provision for the housing needs of all economic segments of the community"); Section 65583(a) (housing element shall consider use of governmental constraints, "including land use controls . . . and local processing and permit procedures to promote housing for all income

levels"); Section 65583(c) (housing program shall establish development standards and zoning for "a variety of types of housing for all income levels, including rental housing"); Section 65590 (within the Costal Zone, "conversion or demolition of existing residential dwelling units occupied by persons and families of low or moderate income . . . shall not be authorized unless provision has been made for replacement of those dwelling units with units for persons and families of low or moderate income"). In determining the validity of the conditions challenged herein, a court may well be required to determine how reasonable such conditions are given the problem related to the City's limited supply of affordable housing. "Drawing the line" of demarcation between reasonable and arbitrary conditions is a determination properly left to the State's own judiciary in order to avoid possibly conflicting standards imposed by Federal Courts. *See Shamrock Development Co. v. City of Concord,* 656 F.2d 1380 (9th Cir. 1981).

Pearl asks this Court to review this case in order to decide whether *Pullman* abstention is appropriate in cases involving challenges to local decisions on land use permit applications even where there are no unsettled questions of general statutory provisions. The City submits, however, that this case does not provide an appropriate vehicle for resolution of that issue. This case involves an important question that the California courts have not addressed or decided. Where such a question is involved—and where the case in addition involves interpretation of a myriad of state and municiple provisions that must be analyzed in the context of a unique factual situation—the

trial court properly abstained and the Court of Appeal properly affirmed that decision. Abstention in this action will insure that the Federal Court does not unnecessarily decide issues of constitutional law and will allow for the determination of uncertain issues of state law in a manner that avoids needless disharmony between the State and Federal systems.

CONCLUSION

For all the foregoing reasons, the City and County of San Francisco respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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